IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

WP(C).No. 30357 of 2006(L)

PETITIONERS:

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1. SHEELA SREEKUMAR, KAILAS BHAVAN,
   MARANADU P.O., KOLLAM.

2. SHEENA, KAILAS BHAVAN,
   MARANADU P.O., KOLLAM.

3. SHEEJA, KAILAS BHAVAN,
   MARANADU P.O., KOLLAM.

4. P. NATARAJAN, KAILAS BHAVAN,
   MARANADU P.O., KOLLAM.

BY ADV. SMT.V.P.SEEMANDINI (SR.)
SRI.M.S.UNNIKRISHNAN
SMT.T.B.REMANI
SMT.S.KARTHIKA
SRI.M.R.ANISON
SRI.T.R.RAJESH

RESPONDENTS:

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1. STATE OF KERALA, REP. BY ITS
   SECRETARY TO GOVT., LOCAL SELF GOVERNMENT
   DEPARTMENT, TRIVANDRUM.

2. THE CORPORATION OF KOLLAM,
   REPRESENTED BY ITS SECRETARY, KOLLAM.

3. THE TOWN PLANNER, KOLLAM DEVELOPMENT
   AUTHORITY, KOLLAM.

R1 BY SR.GOVT.PLEADER SRI.MATHEW G.VADAKKEL
R2 BY ADV.SRI.M.K.CHANDRAMOHAN DAS, SC

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

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W.P.(C) No.30357 OF 2006

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DATED THIS THE 12TH DECEMBER, 2006

JUDGMENT

Ext.P2 letter issued by the Town Planning Officer of the 2nd respondent-Corporation declining the application submitted by the petitioners for occupancy certificate and Ext.P3 order passed by the Secretary of the Corporation reiterating Ext.P2 are under challenge in this Writ Petition.

2. Being convinced that the petitioners have made out a case for examination, I directed that copies of the Writ Petition be served on the Standing Counsel for 2nd respondent-Corporation of Kollam and also on the Government Pleader. Sri.M.K.Chandramohan Das, Standing Counsel accordingly took notice on behalf of the 2nd respondent and Sri.Mathew G.Vadakkel, Government Pleader took notice on behalf of the 1st respondent-State. Sri.Chandramohan Das filed a statement answering the grounds raised in the Writ Petition and resisting the interim relief sought for. The Government Pleader would place before me, the written instructions given to the Advocate General in the matter by the Government.

3. The petitioners being legal representatives of Smt.K.Mani are the co-owners in joint possession of 1 acre 11 cents of land in

Vadakkevila Village, Kollam. This land is situated in residential zone notified by the Kollam Development Authority, the 3rd respondent. Zonal exemption was given by the 1st respondent-Government as per G.O.(Rt.) 4493/2003/LSGD dated 18.12.2003 to late Smt.Mani for construction of a commercial auditorium building and lodge on the property. Based on that order, the 2nd respondent-Corporation issued building permit on 28.1.2004 for the construction of a four-storied commercial building and two storied lodge building. On the basis of the above permit and sanctioned plan, the two buildings were constructed and occupancy certificates were issued for the lodge building on 22.4.2005 and for commercial building on 13.7.2006. On the very same property the petitioners applied again for permit for construction of a separate three storied lodge building. Ext.P1 permit was issued to the petitioners. They claim to have spent more than Rs.75 lakhs for completing the construction of the three-storied building on the strength of Ext.P1 plan and permit. The property, it is submitted, is situated within a distance of only 1 KM. from the office of the Kollam Corporation and the Building Inspectors and Town Planners attached to the Corporation used to visit the construction site regularly till construction of all the three floors of this new building was

completed. It is pointed out that at no point of time any objection was raised by any of the officials of the Corporation regarding the construction. After construction, occupancy certificate was applied for and on noticing the delay on the part of the Corporation, the petitioner filed W.P.(C) No.26879 of 2006 before this Court. During the pendency of that Writ Petition, Ext.P2 letter was issued by the 2nd respondent on 10.10.2006 informing that occupancy certificate can be issued only on regularising the two constructions already effected by the petitioners in the same compound. Later, on the basis of the interim order passed by this Court in the Writ Petition, the 2nd respondent-Corporation issued Ext.P3 order dated 10.11.2006. In the light of Ext.P3 order, W.P.(C)No.26879 of 2006 filed by the petitioners was closed by this Court, reserving the petitioners' right to challenge the validity of Ext.P3 order. Ext.P4 dated 18.12.2003 is the order of the Government granting zonal exemption to the petitioners for effecting construction of the other two buildings on the property, i.e., the two storied lodge building and the commercial building. It was thereafter that on 20.9.2005 the 1st respondent issued Ext.P5 letter to the petitioners informing them that they will have to seek regularisation of the two buildings (two storied lodge building and the

commercial building) either by making the buildings conform to zonal regulations or by obtaining zoning exemption from the Government. Exts.P6 and P7 are the occupancy certificates issued by the 2nd respondent for these two buildings which are actually covered by Ext.P4 exemption order. Petitioners have produced Ext.P8 which is copy of letter dated 6.4.2005 issued by the Government to the Corporation seeking explanation from the Corporation for granting permit for the construction of a commercial-cum-auditorium building in a residential zone. The petitioner could notice Ext.P8 only when the same was produced by the Corporation in W.P.(C)No.26879 of 2006. The petitioner has also produced Ext.P9 dated 29.6.2005, which is copy of explanation submitted by the Secretary of the Corporation to Ext.P8. The petitioners contend that in the peculiar facts and circumstances of this case, the Corporation has no jurisdiction to deny occupancy certificates and even if there is any violation of zonal restrictions, the same can be set at right by giving concurrence to the petitioners as stipulated in Clause 6.2 (2) of the Master Plan. The petitioners also refer to Rule 30(3) of the Kerala Municipality Building Rules, 1999 to contend that lodge building will also come under the category of residential buildings and therefore there is no necessity for

zonal exemption for constructing a lodge building in a residential zone. Impugning Ext.P3 on various grounds, the petitioners pray that Exts.P2 and P3 be quashed and that a mandamus be issued directing the Corporation to issue occupancy certificate for the buildings constructed by the petitioners on the basis of Ext.P1 de hors Exts.P2 and P3. By way of interim relief, the petitioners pray that occupancy certificate be issued provisionally de hors Exts.P2 and P3.

4. In the detailed statement filed on behalf of the 2nd respondent-Corporation, it is stated that from the very beginning itself the stand of the Corporation was that construction of buildings by the petitioners on the plot in question is against the Town Planning Act and also against the approved and notified Master Plan. The Corporation denied permission to the petitioners for construction of the buildings. They approached the Government and obtained zonal exemption. It was on the basis of the zonal exemption issued by Government that the Corporation issued permits to the petitioners for construction of the buildings. Later, the Government found that permission earlier granted is legally bad and issued strict direction by its order dated 6.4.2005 (Ext.P8) to the Corporation to take further action. On 20.9.2005, the Government issued a further letter reminding of Ext.P8

and directing appropriate action against the petitioners for non-compliance with the Town Planning Act and the Scheme. Referring to the judgment in **Sayeesh Kumar v. State of Kerala** (2005 (4) KLT 1027 = ILR 2005 (4) Kerala 769), it is stated that once the development scheme is approved and published in the Gazette stating that a particular area is ear-marked as residential zone, even the Government cannot tinker with the same and grant permission for construction of a non-residential building in a residential zone. The area being ear-marked as residential zone, no construction as made by the petitioners presently is permissible. Individual exemptions would upset the entire scheme and would also adversely affect the health, environment, sanitation, ecology etc. of the locality. The present Writ Petition challenging Exts.P2 and P3 is not maintainable firstly because the petitioners have a remedy by way of appeal under Section 160 of the Kerala Municipality Act to the Tribunal which has been constituted under Section 271S of the Kerala Panchayat Raj Act and secondly because the petitioners have obtained exemption from the Government by ingenious methods. The veracity of the orders passed by the Government and the connected records can be approved only on a thorough examination of witnesses by a competent civil court.

The challenge against Ext.P3 is not sustainable on merits also since Ext.P3 has been passed in the light of ruling Government Orders, the Town Planning Act, the Master Plan of the Kollam Development Authority and also the principles of law laid down by the Division Bench in **Sayeesh Kumar's** case (supra). The statement answers the contention that the Corporation having already issued occupancy certificate in respect of the earlier construction is not entitled to deny occupancy certificate for the present construction by contending that the petitioners are not entitled to demand perpetration of an illegality which has now been recognised by the Government itself. The earlier permit happened to be issued due to mis-representation of fact and law. The statement also refers to Rule 16 of the Kerala Municipality Building Rules which enables the Secretary to cancel, suspend or revoke permits, if it is noticed that permit was issued erroneously or due to mis-representation of fact or law. Occupancy certificate can be issued only on regularising the earlier two constructions. Nobody has a right to claim that he is entitled for occupancy certificate in violation of the Town Planning Act and the Scheme. A conjoint reading of Rule 30 of the Kerala Municipality Building Rules as well as Rule 12 of the Town Planning Act will reveal this aspect.

5. Smt.V.P.Seemanthini, Senior Counsel for the petitioners, Sri.M.K.Chandramohan Das, Standing Counsel for the 2nd respondent and Sri.Mathew G.Vadakkel, Government Pleader for the 1st respondent have addressed me on the question of granting the interim relief sought for by the petitioners. While Smt.Seemanthini would refer to Clauses 6.2 (2) of the Master Plan, the provisions of the approved and notified plan of the Kollam Development Authority such as clauses 6.1.(1), 6.2 (2) and 6.3 (3) and the provisions such as Rule 30(3) of the Kerala Municipality Building Rules. Mr.Chandramohan Das, Standing Counsel for 2nd respondent and Mr.Mathew G.Vadakkel, Government Pleader would rely on Section 12 of the Town Planning Act and the Zoning Regulations set out by the Development Plan and more on the principles laid down by the Division Bench of this Court in **Sayeesh Kumar's** case.

6. I find force in the submissions of Mr.Chandramohan Das as well as Mr.Mathew G.Vadakkel that since contentious issues necessitating an enquiry into the circumstances under which the Government came to pass exemption orders in respect of Smt.K.Mani, the predecessor-in-interest of the petitioners in the matter of construction of the earlier two buildings have arisen, the petitioners

ought to be relegated to their remedies by way of appeal. At the same time, the following circumstances cannot go unnoticed:

1. The building in respect of which occupancy certificate is sought for by the petitioners is a lodge building. The claim that more than Rs.75 lakhs was expended by the petitioners for completing the construction of the building and that all arrangements have been made by purchasing the necessary utensils and equipments for conducting a lodge in the building by incurring huge expenditure was not seriously disputed before me.

2. The construction of the building was on the basis of permit issued by the 2nd respondent. The ground presently raised by the Government as well as the 2nd respondent is that the building is constructed in violation of zoning regulations and in that way offends the law as declared by this Court in **Sayeesh Kumar's** case. Rule 30(3) of the Kerala Municipality Building Rules will show that all lodging and rooming houses, dormitories and hostels will come within the description of Group A2, Special Residential Buildings.

3. The provisions in the approved and notified

development plan will also show that a lodge building will not in any event come within the prohibited uses. Hostels, Boarding houses, commercial offices etc, come within the category of "uses restricted" only. It may therefore be possible for the 3rd respondent to permit a lodge on the plot in question even without zonal exemption from the Government.

4. Refusing to number the building and to issue occupancy certificate will result in a situation wherein the petitioners are compelled to keep the building unused. This situation will result in considerable financial loss to the petitioners who claim to have raised funds for constructing the building and for purchasing the necessary equipments by raising loans from financial institutions. Even in the statement filed by the Corporation, what is contended is that the veracity of the exemption order issued by the Government to the petitioners is an aspect which can be proved only by taking evidence. That the constructions were made on the strength of the exemption order and a permit issued by the Corporation cannot be in question. To what extent the "ingeniousness" of the petitioners or their predecessor is responsible for the exemption order is a

matter yet to be established.

5. The interpolation of one sentence in the last paragraph of Ext.P3 that the building has been constructed in variation from the approved plan, in the handwriting of the Secretary of the Corporation may indicate that the said reason has been stated only on afterthoughts. But what I find from Ext.P1 is that permit is given for a building having three floors. The building which is now constructed has four floors. To that extent, the interpolation of that one sentence in the last paragraph of Ext.P3 was justified.

7. Noticing the above points, I am of the view that even as the petitioners are relegated to their remedies by way of appeal, there is justification for passing the following directions:-

The 2nd respondent-Corporation shall issue occupancy certificate to the petitioners in respect of the ground floor, first floor and second floor of the building constructed by them pursuant to Ext.P1 permit de hors Exts.P2 and P3 on condition that no-objection certificate from the Fire Department will also be produced by the petitioners before the 2nd respondent. It is however made clear that such issuance will be subject to the

final outcome of the appeal which the petitioners prefer against Ext.P3 before the Tribunal. The Writ Petition is disposed of directing the petitioners to prefer appeal against Ext.P3 before the Tribunal for Local Self Government Institutions within three weeks of receiving a copy of this judgment. If such an appeal is received by the Tribunal for Local Self Government Institutions, the Tribunal will entertain that appeal as one filed on time and dispose of the same in accordance with law.

(PIUS C. KURIAKOSE, JUDGE)

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